United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 15, 2003

TO : Stephen M. Glasser, Regional Director
Theodore C. Niforos, Regional Attorney
Raymond Kassab, Assistant to Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Waterland Tile Company 524-5067-1200
Case GR-7-CA-46318 524-5073-1184

This case was submitted for advice on whether an employer's layoff of all union-represented employees and replacement of them with subcontractors upon the expiration of an 8(f) contract violates Section 8(a)(1) and (3) of the Act.

We conclude that the layoff was lawful because there is insufficient evidence to demonstrate that the subcontracting of unit work was discriminatorily motivated.

FACTS

The Employer sells floor coverings from its store in Traverse City, Michigan, and provides installation when requested by the customer. For decades, the Union, Local 9, Bricklayers and Allied Craftworkers, has represented a small crew of employees who install tile and marble flooring for the Employer. A second crew, represented by the Carpenters union, installs carpet, wood and vinyl flooring. Each unit of employees was covered by a Section 8(f) contract, both of which expired on April 30, 2003.[1]

In December 2002, the Employer was audited by the Union for compliance with contractual fund contributions and was found to be about $45,000 in arrears. Around that same time, the Employer asserts that it decided to let the contract with the Union expire and not negotiate a new one. On February 4, the Employer sent timely notification to the Union of its intention to terminate the collective bargaining agreement upon its expiration on April 30.

On or about April 23, the Employer gave written notification to both units of installation employees that they would be placed on indefinite layoff effective April

[1] All dates are in 2003, except where noted.

30. Since then, the Employer has used a small number of subcontractors to provide installation when needed.

It appears that only a small percentage of the Employer's customers desire installation. When a customer purchases flooring and requests installation, the Employer usually hands them a printed sheet containing the names of several contractors for the customer to contact and make their own arrangements. In limited circumstances, when the customer requests, the Employer provides the installation through one of the contractors on the list and bills the customer for the cost of installation to the Employer.

The Employer asserts that it had been losing money for several years and decided to terminate its workforce and subcontract the installation work to obtain better control over labor costs. According to the Employer, subcontractors charge by the square foot, so the cost of a job is fixed, depending on its size. With employees, if a job took longer than estimated, labor costs would rise and eat into the Employer's pre-calculated profit.

ACTION

We conclude that there is insufficient evidence to demonstrate that the subcontracting of installation work was discriminatorily motivated. Therefore, the Region should dismiss this allegation of the charge, absent withdrawal.[2]

Although an employer may lawfully terminate a Section 8(f) relationship after the termination of a contract, it does not follow that it can discriminatorily terminate the employees, even after contract termination.[3] In Automatic Sprinkler, the Board found direct evidence of discriminatory motivation based on employer documents supporting subcontracting as a means to "gain control of labor costs, . . . eliminate labor negotiations; . . . eliminate costs associated with union grievances," and "allow [the employer] to become competitive against nonunion contractors."[4] In Jack Welsh, the Board relied on employer

---

[2] The charge also contains a Section 8(a)(5) allegation regarding the Employer's refusal to provide the Union information. The Region is prepared to issue complaint on certain aspects of that allegation.

[3] Automatic Sprinkler Corp., 319 NLRB 401, 402 n.4 (1995), enf. denied 120 F.3d 612 (6th Cir. 1997); Jack Welsh Co., 284 NLRB 378 (1987).

[4] 319 NLRB at 402.

comments that it was "getting out of the Union," and "going open shop."[5]

There is no similar evidence of anti-Union motivation in the present case. Rather, it appears that the Employer decided to cease employing a workforce to maintain better control over its labor costs, and it would not have mattered whether that workforce was Union or not. Although, arguably, labor costs do flow from the benefits of collective-bargaining, there is no evidence here that the Employer laid off the employees because of their Union status, rather than its desire to cease employing a workforce. Rather, it appears that the Employer made a nondiscriminatory decision to terminate the installation portion of its business upon the expiration of its 8(f) contract, and the layoff of bargaining unit employees was a result of that decision.

We further conclude that the subcontracting of installation work was not inherently destructive of Section 7 rights. In NLRB v. Great Dane Trailers, Inc.,[6] the Supreme Court found that certain facially neutral employer policies might violate Section 8(a)(3) because they are inherently destructive of employee interests, even absent evidence of antiunion animus. However, an employer policy that does not disparately impact employees based on Section 7 activity is not inherently destructive of protected employee rights and does not violate the Act.[7] Here, as in Walton, the evidence fails to demonstrate that the Employer's decision to subcontract the installation work and lay off unit employees had a disparate impact on Union employees. The Employer did not lay off the Union employees in favor of non-union employees. Instead, it terminated the installation portion of its business and no longer employs a workforce of installers. Since there is no evidence of disparate impact based on Union affiliation, we could not argue that the Employer's actions were inherently destructive.

---

[5] 284 NLRB at 378.

[6] 388 U.S. 26, 33-34 (1967).

[7] See Walton & Co., 334 NLRB 780, 784 (2001) (employer policy of refusing to hire applicants with a history of receiving higher wages than the employer's was not inherently destructive because the record evidence failed to indicate a disparate impact on union applicants).

Therefore, the Region should dismiss this allegation of the charge, absent withdrawal.

B.J.K.